RECORD, CASE No. 13,541.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 355.

WILLIAM AERKFETZ, BY FREDERICK AERKFETZ, HIS NEXT FRIEND, PLAINTIFF IN ERROR,

vs.

SOLON HUMPHREYS AND THOMAS E. TUTT, RECEIVERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED APRIL 15, 1889.

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1 In the Circuit Court of the United States for the Eastern District of Michigan.

EASTERN DISTRICT OF MICHIGAN, *ss*:

William Aerkfetz, who is an infant within the age of twenty-one years, by Frederick Aerkfetz, who is admitted by the court here to prosecute for the said William Aerkfetz as his next friend and who is a citizen of the State of Michigan, plaintiff herein, by Griffin & Warner, his attorneys, complains of Solon Humphrey, who is a citizen of the State of New York, and Thomas E. Tutt, who is a citizen of the State of Missouri, receivers of the property and effects of the Wabash, St. Louis & Pacific Railway Company, defendants herein, of a plea of trespass on the case; and thereupon the plaintiff avers:

1. That heretofore, to wit, on or about the 27th day of August, A. D. 1886, the said Wabash, St. Louis & Pacific Railway Company was and before that time had been a body corporate engaged in the business of constructing, operating, and maintaining a railroad in the State of Michigan and elsewhere and in transporting, carrying, and conveying persons and property upon its said railroad and in moving and shifting its said cars and engines in and about its said business from place to place upon its said road and the tracks connected therewith, and the said defendants, Solon Humphrey and Thomas E. Tutt, were then receivers of such railway company under and in pursuance of an appointment as such receivers theretofore made by the circuit court of the United States for the eastern district of Missouri, in equity, in a certain suit therein pending, wherein The Wabash, St. Louis & Pacific Railway Company was plaintiff and The Central Trust Company of New York and others were defendants or The Central Trust Company of New York were compl'ts

2 and The Wabash, St. Louis & Pacific Railway Company and others were defendants, and which said appointment was afterwards and on or about the 27th day of May, A. D. 1884, ratified and adopted by the circuit court of the United States for the eastern district of Michigan, in equity, and the said receivers duly qualified as such and since that date and at the time of committing the grievances hereinafter mentioned were in due possession and control of said road and engaged in operating and maintaining the same in pursuance to such appointment and in transporting, carrying, and conveying persons and property on said road as aforesaid and in moving and shifting the cars and engines of said railroad used in and about their business from place to place upon said road and the tracks connected therewith, and that it then became the duty of the said defendants in carrying on and conducting the business aforesaid and in running said trains and in moving and shifting the cars and engines of said road as aforesaid, among other things, to use proper care and precaution in the conduct and management of said business and to have and provide careful and competent lookouts upon the engines and cars run and propelled or moved or shifted by them and to give proper signals of warning

in case of apprehended danger and to exercise such further care and precaution towards their employees in running their said trains and in moving and shifting them from place to place and in keeping such lookouts properly stationed and in giving such proper signals of warning as would be consistent with the safety of persons in their employ and as would avert danger and accident to their said em-

3 ployees and, further, to observe and keep all such reasonable rules and regulations in regard to the speed and manner of running their said trains and in moving and shifting them from place to place as should be consistent with due care and proper precaution towards their said employees and, in case of apprehended danger and obstructions upon their said track, to use proper care in the stoppage of their said engines and cars in order to avoid danger and accident.

That on or about the day and date aforesaid the said plaintiff, William Aerkfetz, was in the employ of the said defendants and was then engaged in repairing one of the tracks then in the possession and control of the defendants at the yards at Delray, in the township of Springwells, county of Wayne, in said township, yet the said defendants, neglecting their duty in that behalf, did not exercise due and proper preca-tion towards said plaintiff, and did not keep a careful and competent lookout properly stationed on one of their said trains in order to avert danger and apprise said plaintiff of any danger to be apprehended, and did not give proper signals of warning, and did not exercise proper care and precaution in selecting the track over which they should move and shift their said train or trains, and did not, while said plaintiff was upon the track of said defendants at Delray aforesaid engaged in repairing said track and spiking down one of the rails thereof, apprise the said plaintiff that they were about to move or shift their train upon said track, and did not stop their said train in time to avert danger and accident to said plaintiff when, with reasonable care and precaution and with a proper lookout, they might have done so, and that by reason thereof one of the trains controlled and possessed by said de-

4 fendants, consisting of an engine and two cars, was, on or about the day and date aforesaid, at the place aforesaid, backed over and upon the said plaintiff while he, the said plaintiff, was in the exercise of proper care and precaution upon his part and cut, bruised, and injured him, the said plaintiff, so that it became and was necessary to amputate one of the feet of the said plaintiff, and said plaintiff was thrown a distance of about fifteen feet, rendering him for a long time unconscious and bruising him, the said plaintiff, about his head, chest, and lungs, and the said plaintiff became, was, and is permanently disabled and injured, and great expense was incurred for nursing and medical assistance and otherwise, and said plaintiff suffered great pain of mind and body and was for a long time sick, sore, and disabled, to the great damage of the said plaintiff, to wit, the sum of fifteen thousand dollars, to wit, at the district aforesaid.

2. For a second count herein the said plaintiff avers that on or about the 27th day of August, A. D. 1886, he, the said plaintiff,

was a laboring man and engaged in the employ of the said defendant- at the yards then in the control and possession of the said defendants at Delray, in the township of Springwells, in said district, and was then in good bodily and physical condition and able to do and perform regular service in the position in which he was then engaged, and at the time of the committing of the grievance hereinafter mentioned was in the exercise of proper care and precaution upon his part; that at such time the said defendants were receivers of the Wabash, St. Louis & Pacific Railway Company, as hereinbefore and in the first count of this declaration particularly alleged, and were then and there, to wit, on or about the day and date aforesaid, at the district aforesaid, in the possession and control of the engines, cars, property, tracks, franchises, and effects of the
5 said Wabash, St. Louis & Pacific Railway Company, as in said first count of this declaration alleged, and that in carrying on and conducting said business it was the duty of the said defendants to employ and have in their service careful, competent, and prudent men and to employ and keep upon their locomotive engines and cars, in proper place and position, in order to give proper signals of warning, careful and competent lookouts to run and propel their trains and move and shift their cars upon such tracks then under the control of the defendants in such manner as would avert and avoid danger and accident to their employees and to give proper signals of warning to the said plaintiff and other employees engaged in their service in repairing or constructing their said tracks.

That on or about the day and date aforesaid the said plaintiff was directed by the said defendants or their agents and servants to repair one of the tracks controlled and possessed by the said defendants at their yards in Delray aforesaid, and at such time was actually engaged in repairing said track and in spiking down one of the rails of the same, yet the said defendants, neglecting their duty in that behalf, did not exercise proper care and precaution toward the said plaintiff and did not have upon their said trains competent and careful employees and servants to move, shift, and control the same and did not then and there employ and have upon said train a careful and competent lookout, properly stationed, in order to apprise said plaintiff of any anticipated danger and did not give the said plaintiff, who was then engaged in the performance of his duties aforesaid, proper signals of warning and did not run, move,
6 and shift their said trains upon the proper track in view of the plaintiff's service upon the track which he was then repairing, but, upon the contrary, neglected so to do, by means whereof one of the trains of the said defendants, consisting of an engine and two cars, was, at the day and date aforesaid, at the yards of the said defendants in Delray, in the district aforesaid, propelled backwards and backed over and upon him, the said plaintiff, by means whereof he, the said plaintiff, was cut, bruised, and injured about his head, chest, lungs, feet, and other parts of his body and was then and there thrown a distance of about fifteen feet by the force of said engine and cars and became and was unconscious and was for a long time thereafter sick, sore, lame, and disabled and by reason of

such accident became, was, and is permanently disabled and incurred large expense in sickness, care, nursing, and medical attendance rendered necessary by such injury to said plaintiff, to the great damage of the said plaintiff, to wit, the sum of fifteen thousand dollars, to wit, at the district aforesaid.

3. For that whereas also heretofore, to wit, on or about the 2*t*th day of August, A. D. 1886, the said plaintiff was in the employ of the defendants and the said defendants were receivers of the Wabash, St. Louis & Pacific Railway Company under the circumstances and as particularly in the first and second counts of this declaration alleged, and as such receivers said defendants were in the possession and control of the property and effects of said railway company and actually engaged in the management and control of the same and the business connected therewith and *was* then, by themselves and
7 their agents and servants, engaged in moving and shifting a certain train, consisting of an engine and two cars, upon and over one of the tracks at or about Delray, in the township of Springwells, in said district, and that in carrying on and conducting said business it became and was the duty of the defendants to employ careful and competent agents, servants, and lookouts and to cause them to be properly placed and stationed upon said train and to cause the said plaintiff, who was then engaged in repairing one of the tracks controlled by the said defendants at Delray aforesaid, to be apprised of any danger which might be imminent and to give him proper signals of warning in case of the passage of said train upon the track upon which he was then occupied and to exercise such care and precaution in running or backing said train over said track as would avert danger to said plaintiff, and yet the said defendants neglected their duty in that behalf and did not provide careful and competent agents, servants, and lookouts, and did not cause them to be properly placed and stationed upon said train, and did not give said plaintiff proper signals of warning, and did not apprise him of the danger which was then imminent, and did not exercise such reasonable care and precaution in view of the circumstances then existing as would avert danger to the said plaintiff, by means whereof the said plaintiff, who was then in the exercise of proper care and precaution on his part, was run over by the said train being backed upon and over him, and he, the said plaintiff, was cut, bruised, injured, and became sick, sore, lame, and permanently disabled and has suffered great pain of body and mind and incurred great damage and expense in the nursing and medical attendance rendered necessary by the injury aforesaid.

8 4. For that whereas also the said plaintiff, on or about the 27th day of August, A. D. 1886, at Delray, in the township of Springwells, in said district, was in the employ of the defendants and the said defendants were receivers of the Wabash, St. Louis & Pacific Railway Company, as hereinbefore particularly alleged, and as such receivers were then and there engaged in moving and shifting a certain train in their control and possession over the track of the defendants at Delray, in said township and district; that the yards of the defendants are situated at Delray

aforesaid, where many tracks were and are laid and where many trains of the defendants were on the date and date aforesaid being moved and shifted from place to place upon such tracks; that at such time one of the tracks of the said defendants was out of repair, and the said plaintiff was directed to repair the same by the agents and servants of the said defendants, and at such time was actually engaged in the repair of said track in spiking down one of the rails connected therewith; that in view of such repair and the labor which became necessary upon said track it became and was the duty of the defendants to keep said track free and clear from trains passing over it and to move, shift, and propel their said trains over other tracks in and about said yards and to move and shift its trains and cars in such a manner as would avert and avoid danger to the said plaintiff, yet the said plaintiff avers that the said defendants and their officers, agents, and servants neglected their duty in that behalf, and, upon the contrary, the said defendants wrongfully and negligently propelled and backed one of their said trains over and upon the track upon which the said plaintiff was then
9 engaged without apprising him, said plaintiff, of their intention so to do and without giving him any proper signlas of warning, in view of the fact that trains were then passing and repassing upon other tracks adjacent thereto, of the approach of said train, by means whereof the said plaintiff, while in the exercise of proper precaution and prudence on his part, was run over by the said train of the said defendants and was cut, bruised, injured, and became and was unconscious for a long time thereafter and became and was sick, sore, and disabled and became and was and is permanently disabled and suffered great pain of body and mind and incurred great expense in nursing, care, and medical attendance rendered necessary by the injury aforesaid.

To the damage of the said plaintiff of the sum of fifteen thousand dollars. Wherefore he brings suit.

GRIFFIN & WARNER,
Attorneys for the Plaintiff.

Filed May 17th, 1887.

WALTER S. HARSHA, *Clerk.*

10 U. S. Circuit Court, East'n Dist. of Mich.

WILLIAM AERKFETZ, by Next Friend,
vs.
SOLON HUMPHREYS *et al.*, Receivers, &c.

I hereby become security for all costs to which the defendants may become entitled in the above cause.

GRIFFIN & WARNER.

Filed in clerk's office May 20th, 1887.

WALTER S. HARSHA, *Clerk.*

11 Circuit Court of the United States for the Eastern District of Michigan.

WILLIAM AERKFETZ
vs.
SOLON HUMPHREYS, THOMAS E. TUTT. } No. 7531.

And now comes the said defendants, by Alfred Russell, their attorney, and demands a trial of the matters and things set forth in the plaintiff's declaration.

June 4, 1887.

Yours, &c., ALFRED RUSSELL,
Att'y for Def'ts.

Messrs. Griffin & Warner, att'ys for pl'ff.

Endorsed: Plea. Filed in clerk's office June 4th, 1887. Walter S. Harsha, clerk.

12 At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Friday, the sixteenth day of December, in the year one thousand eight hundred and eighty-seven.

Present: The Honorable Henry B. Brown, district judge.

WILLIAM AERKFETZ, by His Next Friend, FREDERICK AERKFETZ,
vs.
SOLON HUMPHREYS and THOMAS E. TUTT, Receivers of the Wabash, St. Louis & Pacific Railway Company.

The parties in this cause being in court, by their respective attorneys, ready for trial, thereupon comes a jury, namely, William Brown, Charles B. Cole, James Cavell, Myron Bignall, Amos Burgess, J. B. Todenbres, Eugene W. Watson, J. C. Powell, Abner Hull, Jesse A. Underwood, Sanford N. Lyon, and Jacob Silberman, good and lawful men, who, being duly empaneled, tried, and sworn well and truly to try the issue between the parties, sit together and hear a portion of the evidence in the case.

13 At a session of the circuit court of the United States for the eastern district of Michigan continue- and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Saturday, the seventeenth day of December, in the year one thousand eight hundred and eighty-seven.

Present: The Honorable Henry B. Brown, district judge.

WILLIAM AERKFETZ, by His Next Friend, FREDERICK AERKFETZ,
vs.
SOLON HUMPHREYS & THOMAS E. TUTT, Receivers of the Wabash, St. Louis & Pacific Railway Company.

In this cause the jurors heretofore empaneled and sworn come into court *court* again and sit together and hear the conclusion of the evidence in the case.

14 At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Tuesday, the twentieth day of December, in the year one thousand eight hundred and eighty-seven.

Present: The Honorable Henry B. Brown, district judge.

WILLIAM AERKFETZ, by His Next Friend, FREDERICK AERKFETZ,
vs.
SOLON HUMPHREYS and THOMAS E. TUTT, Receivers of the Wabash, St. Louis & Pacific Railway Company.

In this cause the jurors heretofore empaneled and sworn come into court again and sit together, and, after hearing the argument of counsel and the charge of the court, retire, under the char-e of an officer of the court duly sworn for that purpose, to consider their verdict to be given, and after being absent for a time return into court and say upon their oaths *say* that the said defendants are guilty of the premises in plaintiff's declaration in this caus- laid to their charge in manner and form as *as* the said plaintiff hath therein alleged, and they assess the plaintiff's damages by reason thereof at the sum of four thousand five hundred dollars.

15 The Circuit Court of the United States for the Eastern District of Michigan.

WILLIAM AERKFETZ, Plaintiff, by Next Friend,
vs.
SOLON HUMPHREYS & THOMAS E. TUTT, Receivers, &c.

Now comes the said defendants and move to set aside the verdict and move for a new trial for the following reasons, to wit:

1. Because, under the order of the court and the publication thereunder proved in the cause, the plaintiff not having submitted his claim in accordance with said order, his said claim was forever barred.

2. Because the court declined to direct a verdict for the defendants both on the ground that the plaintiff and the defendants' servants charged with negligence were fellow-servants and also on the ground of the plaintiff's contributory negligence.

3. Because the court declined to give the charges requested by the defendants.

4. Because the court charged that the jury might consider, there being no statute and no evidence on the subject, whether prudent management required the defendants, by their servants, to have the bell rung upon their switching engines constantly moving about the yards as between them and the plaintiff and other employees in the yard.

16 5. Because the verdict was against the weight of evidence.

6. Because the verdict was excessive.

ALFRED RUSSELL,
Attorney for Defendants.

Endorsed: Motion for new trial. Filed Dec. 20, 1887. Walter S. Harsha, clerk.

17 At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the sixth day of February, in the year one thousand eight hundred and eighty-eight.

Present: The Honorable Howell E. Jackson, circuit judge, and present the Honorable Henry B. Brown, district judge.

WILLIAM AERKFETZ, by Next Friend,
vs.
SOLON HUMPHREYS *et al.* } Before Judge Jackson.

In this cause a motion by defendants for a new trial is argued by Mr. Alfred Russell for the defendants and Mr. C. E. Warner for plaintiff, and thereupon said motion is submitted.

18 At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court -oom, in the city of Detroit, on Friday, the tenth day of February, in the year one thousand eight hundred and eighty-eight.

Present: The Honorable Howell E. Jackson, circuit judge, and present the Honorable Henry B. Brown, district judge.

WILLIAM AERKFETZ, by FREDERICK AERKFETZ, His Next Friend,
vs.
SOLON HUMPHRIES & THOMAS E. TUTT. } Before Judge Jackson.

In this cause, a motion by defendants for a new trial having been heretofore argued and submitted and mature deliberation having been thereupon had, it is by the court now here ordered that the verdict heretofore entered in favor of said plaintiff for $4,500 be, and the same is hereby, vacated and set aside, and that a new trial of said cause be had.

19 Circuit Court of the United States for the Eastern District of Michigan.

WILLIAM AERKFETZ
vs.
SOLON HUMPHREYS *et al.*, Receivers.

Oral Opinion Delivered Feb'y 10, 1888.

JACKSON, *J.*:

We have considered the application of the defendants for a new trial in the case of William Aerkfetz *vs.* Humphreys *et al.*, receivers of the Wabash railroad, and have reached a conclusion that there ought to be a new trial in that case.

The plaintiff was employed by the road in repairing the track on

the depot ground, and at the time of the accident was engaged in making repairs on a track in the depot grounds and was injured by one of the switch locomotives that was employed in the yards, which had passed him about ten minutes before, going out, as indicated on this map, in this direction. He knew that the switch engine was constantly engaged on these tracks and that it had only passed him ten minutes before and was liable to return at any time. He seems to have turned his back in this direction and to have been engaged in readjusting the rail in some way, and was paying no attention to the return of the locomotive. We cannot see from an examination of the case on these facts wherein consisted the negligence of the company on which a liability to the plaintiff can be rested. We see no negligence on the part of the company, but we see a want of reasonable care and diligence on the part of the
20 plaintiff in not guarding against what was a manifest danger to him or any person thus employed. Upon principle I am unable to distinguish the case from the — of Goodloe *vs.* The Nashville R. R. Co., reported in 122 U. S. Report. In that case the court took the case from the jury entirely. The facts stated in the opinion of the court were as follows: "The evidence in the case satisfies me that the defendant complied with the requirements of sec. 1166 of the Code of Tennessee, so far as the circumstances attending the complainant's injuries are concerned. Plaintiff was an employee of the defendant and was bound to use at least the care and diligence of a reasonable and prudent man in its service. He seems to have gone two or three times to the agent of Franklin to inquire the time, thus showing that something had raised his apprehensions and put him on his inquiry; that he stopped the hand car and listened for the approaching train, and yet went into the deep cut and sharp curve, where he was hurt, without having sent any flagman or other person ahead to warn the train of approaching danger. In this he did not exercise reasonable care and prudence, but was guilty of negligence, so that had the people upon the train been injured they could have recovered against his employer for his negligence. Under the facts proven in this case had the jury given a verdict I should feel bound to set it aside and grant a new trial. In such a state of the case it is my duty to instruct you to find a verdict for the defendant, and I accordingly do so, declining to give the instructions requested by plaintiff's counsel."

Now, there is practically no difference in principle between that case and this. It was gross negligence for a person to place
21 himself in such a position as that and pay no further attention to the passing train. The plaintiff in this case knew that a switch locomotive had just gone out and was liable to return at any moment. By the Tennessee code the engineer was required to ring a bell and blow the whistle and keep a lookout ahead; this was on the main track. Here the accident occurred in the depot ground, where the decided weig*th* of authority agrees that there is no such ringing of the bell or blowing of the whistle required. Under the circumstances of this case we can see no negligence on the part of the defendant, and we can see a want of reasonable dili-

gence and care on the part of the plaintiff. The result is that there must be a new trial of this case.

BROWN, *J.*:

I had just enough doubt in regard to this case to be willing to submit it to the jury and desire a conference with the circuit judge in regard to it, but if I ever had any doubt at all they are resolved by the opinion of the circuit judge. I do not myself see any negligence on the part of the railroad company. There is no complaint made that the train was running at too great a speed. It was running slowly, and there is no obligation under the statute, clearly, to ring the bell, and I do not see, as against the servants of the company who are working in the yard of the railroad company, that there is any obligation to ring the bell to warn persons who are working on the track where the train is running at a moderate rate of speed. With half a dozen switch engines running
22 up and down the yard, the very ringing of the bells might nullify any warning given to a person on the track. Clearly there was no obligation to keep any lookout on the rear end of the car. I do not think there was any obligation as between the engineer and the employees of the railroad, either at common law or under the ordinance, to ring the bell.

With regard to the question of their being fellow-servants, I think we are both of us in a good deal of doubt, and we do not express any opinion about it one way or the other; but I think both of us are satisfied that plaintiff should be barred from recovery on the ground of a want of negligence on the part — railway company and on the ground of his own contributory negligence. While the accident is a very disasterous one to the plaintiff, still we cannot fit the law to the exigencies of a particular case.

Judge JACKSON: The first impressions of the circuit judge were that they were fellow-servants, but the argument of Mr. Warner leave- that matter in such doubt that I am not willing to pass upon it. It is not necessary to pass upon it in this decision. We therefore rest the case alone upon the contributory negligence of the employee who was injured.

PLAINTIFF'S COUNSEL: I do not know that there *si* any object in pl*i*antiff reintroducing his testimony, and would suggest that the entire testimony be considered in evidence and your honor direct a verdict.

Judge BROWN: Certainly; we can do it in ten minutes.

Judge JACKSON: Oh, yes; or you can agree without the intervention of a jury that it can be done now and then you can take
23 it up. You claim an amount sufficient in your declaration to take it up. Let it take that course as the shortest and least expensive way.

24 At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on

Friday, the sixteenth day of March, in the year one thousand eight hundred and eighty-eight.

Present: The Honorable Henry B. Brown, district judge.

WILLIAM AERKFETZ, by FREDERICK AERKFETZ, His Next Friend,
vs.
SOLON HUMPHREYS & THOMAS E. TUTT, Receivers, &c.

The parties in this cause being in court, by their respective attorneys, ready for trial, thereupon comes a jury, namely, John H. Bowman, Thomas Harvey, John S. Henderson, Henry M. Baily, John Patterson, Louis Welling, Perry Henderson, Gabriel Hopingamer, Thaddeus A. Smith, Charles Fishback, William B. Everest, and Almond L. Booth, good and lawful men, who, being duly empaneled, tried, and sworn well and truly to try the issue between the parties, sit together, and, after hearing the evidence in the case, under the instructions of the court, without leaving their seats, say upon their oaths that the said defendants are not guilty of the premises in the plaintiff's declaration in this cause laid to their charge in manner and form as the said plaintiff hath therein alleged. Thereupon, on motion of Alfred Russell, attorney for said defendants, it is by the court now here considered that the said plaintiff take nothing by this suit, and that the said defend-
25 ants go thereof without day; and it is further considered that the said defendants do recover against the said plaintiff their costs and charges by them about their defense in this behalf expended, to be taxed, and that said defendants have execution therefor.

26 At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the fourth day of June, in the year one thousand eight hundred and eighty-eight.

Present: The Honorable Henry B. Brown, district judge.

WILLIAM AERKFETZ, by His Next Friend,
vs.
SOLON HUMPHREYS *et al.* } 7531.

On motion of Mr. J. C. Berry, of counsel for plaintiff, it is ordered that the time to settle a bill of exceptions be, and the same is hereby, extended thirty days from this date.

At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Monday, the seventeenth day of December, in the year one thousand eight hundred and eighty-eight.

Present: The Honorable Henry B. Brown, district judge.

WILLIAM AERKFETZ
v.
SOLON HUMPHREYS *et al.*

On filing stipulation signed by Alfred Russell, defendants' attorney, and on motion of Griffin, Warner, Hunt & Berry, plaintiff's attorneys, it is ordered *nunc pro tunc* as of March 16, 1888, that the time to settle a bill of exceptions be, and the same is hereby, extended until February 1st next.

27 The Circuit Court of the United States for the Eastern District of Michigan.

WILLIAM AERKFETZ
v.
SOLON HUMPHREYS and THOMAS E. TUTT.

It is hereby stipulated by counsel for the respective parties that an order may be entered in said cause *nunc pro tunc* as of March 16, A. D. 1888, extending the time to settle bill of exceptions in this cause until February 1, A. D. 1889.

ALFRED RUSSELL,
Att'y for Def'ts.

Dated Detroit, Decemb-r 3, A. D. 1888.

Endorsed: Stipulation. Filed Dec. 17, 1888. Walter S. Harsha, clerk.

28 The Circuit Court of the United States for the Eastern District of Michigan.

WILLIAM AERKFETZ
vs.
SOLON HUMPHREY and THOMAS E. TUTT.

I hereby consent that an order may be entered by the court extending the time to settle the bill of exceptions in this cause until February 15th, 1889.

ALFRED RUSSELL,
Att'y for Def'ts.

Endorsed: Filed Feb'y 2, 1889. Walter S. Harsha, clerk.

29 At a session of the circuit court of the United States for the e-stern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Saturday, the second day of February, in the year one thous-nd eight hundred and eighty-nine.

Present: The Honorable Henry B. Brown, district judge.

WILLIAM AERKFETZ, by Next Friend,
vs.
SOLON HUMPHREYS *et al.*

On filing stipulation signed by the attorneys for the respective

parties it is ordered that the time to settle a bill of exceptions be, and the same is hereby, extended — February 15.

(Here follows diagram marked p. 30.)

31 The Circuit Court of the United States for the Eastern District of Michigan.

WILLIAM AERKFETZ, by FREDERICK ARKFETZ, His Next Friend,
vs.
SOLON HUMPHREYS and THOMAS E. TUTT, Receivers, &c.

This cause, on the 16th day of March, 1888, came on for trial before the Honorable Henry B. Brown, judge of said court, and a jury, and the defendants, by their counsel, thereupon conceded that the defendants were receivers of the Wabash, St. Louis & Pacific Railway Company, a body corporate, &c., and were acting in that capacity at the time the injuries in the plaintiff's declaration mentioned were committed.

The plaintiff, further to maintain the issue on his part, was sworn as a witness, and testified as follows:

I am the plaintiff and am the person who was injured by the railway company in August, 1886. I was twenty years old in November, 1886. At the time of the accident I was employed as a laboring man—a section man—and worked in the yards of the railway company at Detroit and at Delray. Delray is in the western part of the city, about three miles out. I had worked for the receivers about eighteen months at the time of the accident. There are quite a number of tracks in the yards at Delray. I was a section man repairing the tracks at the time of the injury. I was set to putting on a pair of splices, and after putting them on I was told to spike the joint up, and while spiking it a car struck me
32 and run over me. The splices referred to are pieces of iron with four bolts. There is a notch in each of the splices, and there is a spike in them to keep the rails from running back. I was spiking the rails at the time I was struck. There were about seven or eight tracks in the yard. There was a main track running through the yard and a number of tracks running on either side of the main track. I was on the south side of the main track, towards the river. Mr. Modlin, the foreman of the track repairing, directed me to do the work. I was at work under his general direction and he was the man who directed me to spike down the splices. I had been at work twenty or thirty minutes on the lead when I was struck.

Q. In what position were you when you were struck?

A. I had my back to the east, and the train came from the east when it struck me.

I was standing astraddle of the south rail, facing toward the west, and the train came from the east. The engine was pushing the cars. There were two cars ahead of the engine. The tracks in the yard were about a quarter of a mile in length. There were no obstruc-

tions which would prevent any one on the train as it came from the east from seeing me except the train itself. I had worked at both the Detroit and Delray yards; had worked the greater part of the time at the city yards. I saw nothing of the train until it run over me and until the- pulled me off the track. A gravel train was going west on the main track at the time I was struck. The main track was about thirty feet north. I heard no noise from the train that struck me. Before I was struck there was no signal of any
33 kind given. There were no men stationed on the cars at the time I was run over. I couldn't say where the fireman and engineer were. The engine was backing and pushing these two cars. After I was struck the first person I saw was the fireman. He came around the back of the engine, walked up to me, and pulled off my shoes. At this time I was exercising the usual care that I ordinarily exercise around the yards. I understood the general danger and understood it was necessary to exercise care in my occupation. The position I was in at the time, with my legs astraddle of the track, was a position which was required for the proper performance of t-e work in which I was engaged. There are notches in the spikes and the spikes just catch the edge of the tie, so I had to stand that way in order to drive the spike into the tie in the proper manner. I had no reason to know that any train was coming down the track at that time. My attention was not in any manner called to the fact that the train was on the track or was expecting to pass along the track. When I was struck I was thrown a number of feet. The train run about a car and a half's length, so that engine was pretty nearly opposite me when it stopped; first saw the engineer or fireman after I was struck. They came from the east. It had been the custom in the yard to have persons stationed on top of moving trains. There were supposed to be two—one located in the front of the train and one at the hind end. Taking a train made up as this train was made up, one man should have been located on the front of the train and one at the back end. A bell is usually rung as a signal in the yards upon moving trains, and a whistle is sounded. In case of seeing anybody on the
34 track the main signal is by the bell. William Henderson, the yardmaster, directed the movements of the train. The complement of men usually on moving trains consists of the engineer, fireman, and two switchmen. A switchman is usually upon the train besides the engineer. The switchman is one of the men who usually attended the train as a helper and who signals the trains. He is supposed to be on the front end of the train. The accident occurred about the middle of the afternoon.

The witness further detailed his injuries, which consisted, in the main, of his left foot being run over and cut off, his back being bruised, and internal injuries and hemor-ages, in consequence of which he had suffered great pain and sustained permanent injuries and loss. The witness was in good health before he was struck, and at the time of the injury was receiving $1.20 per day.

The witness was subsequently recalled and testified that he knew nothing of any train having passed down the lead from the main

track and being on any tracks south of the lead. No train had passed up or down there at all, to his knowledge. A train passed on the main track, north of him, going west. No train had passed upon the lead leading from the main track to the several side tracks while I was at work upon it. I think I had worked about twenty or thirty minutes on the lead, and prior to that time I had no knowledge that a train had passed. I saw no train passing that track at all. When I came to work at this point on the lead I came from the Detroit yards and was set to repairing this track by the foreman of the yards.

35 CHARLES K. MODLIN was sworn on behalf of the plaintiff, and testified as follows:

I reside at Detroit, and at the time of the accident was assistant foreman for the receivers of the Wabash Railway Company. My special duties were to make necessary repairs to the tracks in the yard, and at this time I was engaged in repairing the tracks at the yard at Delray. I know the plaintiff. He was employed there under my directions. He was putting on a pair of plates of splices in the Delray yards. He had the plates on and was spiking the joints. There are slots in the angle *plaints* that are cut so as to keep the rail from running endways, and one spike goes into each slot, one on the outside of the rail and one on the inside. He was driving the inside spike at the time he was struck. In order to drive the spike he would have to occupy a position according to the way a man strikes. He strikes right-handed and was striking on the inside of the rail, and necessarily he would have to stand astraddle of the rail to work or else close to the rail, with his face to the west. William Henderson was employed about the yard as yardmaster, and his special duty was to see that ordinary trains were made up and ready for the road and to see to the switching of cars and delivering them at the proper places. The yardmaster is supposed to have charge and to give orders that certain cars shall go on certain tracks. I have no connection with that department. The train that struck Arkfetz consisted of an engine and two cars going to the west. The cars were being shoved ahead of the engine. The length of the yard is something over one-half of a mile, and the main track runs through the yard at this point. The track upon
36 which he was struck is south of the main track. There are about seventeen tracks in the yard. A construction train consisting of about thirty or thirty-two flats was going out at the time of the accident. I was about one hundred and fifty feet to the east of where the accident occurred. I was fixing a frog in the yard with two men. Arkfetz was about one hundred and fifty feet west of me, spiking a joint, as I have before said, and the engine was east of me, doing some work back in the yard. It came pretty close to where I was working with two other men, and we stepped out of the way to let it pass. When we stepped back I saw he was working at his joint and not noticing the train. He had his back toward the train, so I gave the signal to the engineer or tried to do it, but the engineer was passing with his back towards me and kind of

sidewise, in his proper place, and the cars kept moving until they cut off the sight between me and Arkfetz. Then I ran around the opposite side of the tender, and I saw him sitting up holding his leg. He said his leg was hurt. I unlaced his shoe and saw his foot was badly crushed. The ordinary complement of men in charge of switching trains is the man who has charge of the engine and a helper, fireman, and engineer. I noticed the helper about the train, and the fireman and engineer.

The helper was between the main track and this track on the south side of the main track. He was not on the train.

Q. Was he in any position on the train where he could look out and see what was ahead of the train?

A. He was not on the train. The engineer and fireman were in the cab.

37 Q. Will you state whether, as they were in the cab, their view would be obstructed from that point ahead by the cars they were pushing?

A. The engineer's view would be obstructed more than the fireman's on account of his standing on the south side of the rail and the engineer being on the north side. The fireman could possible see him before he got too close to him. The fireman was on the train at the time. The first they knew of the accident was when by the gathering they noticed somebody was hurt. I flew around the back end of the tender, and, if I mistake not, the engine stopped right close to us. I was the first one to get to him. If any person had been stationed on the top of the cars there would have been nothing to obstruct his view of Arkfetz. We had been engaged on this particular track about one hour. The engine was a switching engine. The engineer and helper were operating there that day and could see us working as they passed. There was no difficulty about any one seeing any of the workmen engaged on the tracks unless he was behind the cars. The occupation of the men was open to observation of the engineer during the afternoon. There was no signal of warning of any kind given by the men on the train to Arkfetz that I saw. I couldn't say as to the bell ringing, but I didn't hear any. I heard no whistle. I gave the usual signal known among railroad men to the engineer to stop his engine, but he did not hear it; I did not get his attention.

Upon cross-examination the witness testified as follows:

38 There would not have been any difficulty in Arkfetz getting out of the way if he had been aware of the approaching train, but he was not aware of it. I was not working with any tools at the time, only standing there. It seems that Arkfetz was not aware of the danger. I saw the engine coming. He did not see it because he had his back towards it. If he had got up and turned around there would have been no trouble. I generally keep a pretty sharp lookout and I suppose Arkfetz did also.

Q. Was there anything to prevent seeing that train?

A. Yes, sir; in the position he was at that time.

Q. Was it not his business to look around to see that he did not get run over?

A. It is any man's business to be as careful as possible about getting hurt.

Q. He knew that train was liable to come down upon him at any moment?

A. The switching engine goes up and down quite often. The switching engine had gone by him ten or fifteen minutes before that, on the same track upon which I was at work. Arkfetz had always been a very careful and good man.

FRED. ENGFER, sworn upon the part of the plaintiff, testified as follows:

I am a farmer and live in Monguagon township and know Arkfetz. At the time of the accident, on August 27th, 1886, I was coming down from the city of Detroit, walking on the Wabash track. I did not see the accident, but saw Arkfetz right after it was done. I was, as I should judge, about sixty yards from where the accident happened. I was walking down the track and I saw the
39 engine pushing two cars ahead, and I saw Mr. Modlin giving a signal, waving toward the engine, as if he wanted them to stop. A moment afterwards I saw him run and jump around back of the engine. I immediately walked faster and got there and pulled off the shoes of the young man that was hurt. The train was going west. I was also going west, and the train was on the south side of me. There was no one on the train except the engineer and the fireman. Nobody was stationed *nobody was stationed* on the train. There was no signal given. No bell rung or whistle sounded.

Other testimony was given upon the part of the plaintiff tending to show the extent of the injuries which plaintiff sustained by the accident in question.

The plaintiff thereupon rested.

Defendants' counsel, to maintain the issue upon its part, called JAMES CURREN as a witness, who gave testimony tending to show he was switchman of the defendants, and that he saw Arkfetz the night he was hurt; that he was brought down in the train, sitting in the caboose; that witness went in to see him and asked him how it happened, and that Arkfetz told him by his own carelessness; that he was watching a gravel train going out and it was his own fault for getting struck in not attending to his business.

AMBROSE CICOTTE was also called by defendants and gave testimony tending to show that he was the track foreman of the defendants, and that he saw Arkfetz the evening he got hurt, when Arkfetz said to him, Ambrose, if I had been watching the working train and tending to my business this would not have happened.
40 The conversation occurred at his father's house.

On cross-examination the witness testified that he had quite

a conversation with the plaintiff the first night after he was injured. He stayed with him until eight o'clock, and didn't ask him on the first evening he got hurt, and that in all the conversation he had with him during about two hours he never asked the plaintiff how it happened; that he did not ask him the question until he saw him at his father's house, in bed. His mother was there and — stranger. The father was in there awhile and walked out. His mother was there when he asked the question.

J. C. FARLEY, a witness for the defendants, testified as follows:

I have been an engineer since 1882. I had known the plaintiff as a section man five or six months.

A chart, a copy of which is hereto annexed and marked Exhibit A, was produced and shown the witness, which he identified as substantially correct, and the witness continued:

On the 27th of August last I was running a train at the yards. I had been up and down the track probably a dozen times that afternoon, and up and down that track probably a half a dozen times in the last half hour before the accident, on a switching train. When I had passed there before Arkfetz got hurt I saw him and others working on the track. I do not know how many others. I know that the foreman was there and two or three other men. There might have been four men that were working along there. Probably five or ten minutes passed between going down the track towards the
41 east and going back west. I came in onto the tracks off the lead with two box cars ahead of the engine. My engine was heading west. There was no one on the train but the fireman and myself. Two men is a proper number with an engine. They are not supposed to be on the train and can't be on the train and do their work. I could not say that I knew Arkfetz was there working when I started to go west with the train. I knew that the section men were working along there. I knew that some people were working on that track, repairing it, because I had been passing amongst them probably for an hour or more. I had passed the place where Arkfetz was working probably half a dozen times within the space of an hour. When I started to go past the place where Arkfetz was working I knew somebody was working there. I directed my fireman to ring the bell, but I did not stop until I received the signal from McDermott, who was ahead of me. He gave me the signal to come ahead and I says to the fireman, "Ring the bell, the section men are working ahead of us," and he rang the bell and I moved ahead with caution as fast as a man could walk. A gravel was pulling out there on the main track about the same time. Patterson rang the bell. I saw it and heard it. The first I knew that anybody was hurt my fireman said so, and then I saw the watchman ahead of the car—probably a car length—drop down and look that way, and I though that some of the brake beams were lost. McDermott is in St. Louis and is not able to come here. When my fireman said somebody is getting hurt he jumped off the engine. I stopped as quick as I could. It did not take long to

stop. The fireman jumped off and ran to him, and by the time he got there the switchman was there, and when I got there the switchman and fireman were both there and Arkfetz was lying by
42 the side of the track with his leg crushed.

On cross-examination the witness testified as follows:

I fired quite a number of years before I commenced working upon an engine as engineer; never worked for any other road than the Wabash since that time. There were six tracks that we were using. None of our work was done on the track the gravel train was on. I cannot tell which of the tracks I took the cars from at the time the plaintiff was hurt. We had cars we were switching probably on three or four tracks, the trains being made up in rotation. We were switching backwards and forwards on three or five or probably five or six tracks. I was on the north side of the engine, or the right-hand side, and was looking out of the side window. The cars vary from 28 to 30 feet in length. Before I started ahead with the engine the train was standing at a point where the westerly end of the west car was about ninety feet from the point of the accident—about three car lengths. I knew the section men were working along there. If I had looked out on the right-hand side from where I was before I started with the plaintiff, located as he was, I could not have seen him; my view would have been obstructed by the car. I could not say whether the fireman could have seen him had he looked out on the west side. The cars were ahead of us; they were the only obstruction. The switchman who gave us the orders between this track and the main track — up ahead; he was ahead of the man who was hurt.

In running a train in the ordinary way where we are switching cars it is not necessary to have a man stationed at the front of the train. It is usual in all yards in cutting off cars to run them without a man on the cars.

43 Q. Do you ever have a man on the car?

A. Not unless it is really necessary.

Q. When is it really necessary?

A. Not unless there is danger to property or something of that kind.

Q. Suppose it is dangerous to life and not property?

A. Yes, sir; I suppose they would if they knew it.

Q. Suppose they knew that men were engaged working there?

A. No, sir; because we are working right with them every day, day in and day out. I am subject to the yardmaster's and conductor's orders. When I started ahead I got a signal from Thomas McDermott, the conductor, who has entire charge of the engine. I was running about as fast as a man could walk; just a steady gait. I was moving very slow, for I did not move only a couple of car lengths. If I had known that plaintiff would not have got off the track I would have whistled.

JOHN PATTERSON, sworn on the part of the defendant-, testified as follows:

I was fireman at the time Arkfetz got hurt. The account of Mr. Farley of the action of the train is correct, as near as I can get it. The engineer got the signal to move ahead. He says to me, "John, ring the bell, the section men is on the track." I rang the bell. I gave it a good ring and kept ringing it. I had my head out of the window, and the first I saw the man was knocked down before the car, and I said, "Somebody has got hurt, hold on to the car."

Defendants thereupon rested.

44 WILLIAM ARKFETZ, plaintiff, was thereupon recalled in his own behalf and testified as follows:

I know Mr. Curren. I did not see him in the caboose at the Twelfth-street yard on the day of the accident. I have heard his testimony in regard to what I told him. I never spoke a word to the man and never saw him that day. I did not tell him that the accident occurred on account of my own carelessness or fault. I never saw him. The accident was not owing to my own carelessness or to my own fault, and I did not make any statement to the effect that the accident was owing to my watching the gravel train.

I know Mr. Cicotte. He was at my father's house several nights after the accident, but not the next night. He was there on one occasion, but I did not speak to him. He did not come into my room when I was lying on the bed and ask about the accident. I never said to him that if I had not been watching the gravel train, but had been attending to my own business, the accident would not have happened. I never spoke any such words to him. My father was in the room all the while at the time Mr. Cicotte was there at the house.

FREDERICK ARKFETZ, sworn upon behalf of the plaintiff, testified as follows:

I know Mr. Cicotte. He was at my house about the eleventh day after the boy was hurt. He was not there the next day. Two other boys from the Wabash road and several neighbors were with him. He talked with me. I was in the room all the time that Cicotte was there, and I walked away with him three blocks from the house.

45 Cicotte did not state at the time to the boy when he was in the house that he came there for the purpose of finding out how the accident occurred in order to make his report to the company. The boy never stated to him that if he hadn't been watching the train and had been attending to his business the accident would never have occur-ed. He never said a word about it.

The plaintiff thereupon rested.

The defendants, by their counsel, thereupon moved the court to take the case from the jury and to instruct the jury to return a verdict for the defendants upon the following grounds, to wit:

1. That the plaintiff was a fellow-servant with the defendants' servants charged with negligence.

2. That the plaintiff was guilty of contributory negligence and therefore not entitled to recover.

3. That no case for submission to the jury has been made out by the plaintiff, and that, under the evidence, the defendants are entitled to a verdict.

The court thereupon instructed the jury that the plaintiff had made out no case for the jury, and that their verdicts must be for the defendants in said cause.

To which rulings and decisions the said plaintiff, by his counsel, then and there duly excepted.

The jury thereupon, in accordance with the instructions of the court, returned a verdict for said defendants.

And because none of said exceptions appear of record this bill of exceptions — made, settled, and signed this 15th day of February, A. D. 1889.

HENRY B. BROWN, [SEAL.]
District Judge.

Filed February 15, 1889.

WALTER S. HARSHA, *Clerk.*

46 UNITED STATES OF AMERICA, }
Eastern District of Michigan. }

To the honorable the justices of the Supreme Court of the United States:

And now comes William Aerkfetz, by Frederick Aerkfetz, his next friend, by Griffin & Warner, his attorneys, and complains that in the record and proceedings and also in the rendition of judgment in a suit between William Aerkfetz, by Frederick Aerkfetz, his next friend, plaintiff, and Solon Humphreys and Thomas E. Tutt, receivers, &c., defendants, tried in the circuit court of the United States for the eastern district of Michigan at the March term thereof, A. D. 1888, in which judgment was rendered against him, the said plaintiff, on the 16th day of March, A. D. 1888, manifest error hath intervened, to the great damage of the said plaintiff; wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court.

GRIFFIN & WARNER,
Att'ys for William Aerkfetz, by Fred'k Aerkfetz,
His Next Friend.

Allowed.
HENRY B. BROWN,
Dist. Judge.

Endorsed: Petition for writ of error. Filed March 11, 1889. Walter S. Harsha, clerk.

47 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Michigan, Greeting:

Because in the records and proceedings, as also in the rendering of judgment in a suit, before you or some of you, between William Aerkfetz, by Frederick Aerkfetz, his next friend, a citizen of the State*n* of Michigan, plaintiff in error, and Solon Humphreys, a citizen of the State of New York, and Thomas E. Tutt, citizens of the State of Missouri, defendants, a manifest error has intervened, to the great damage of the said plaintiff in error, as in his complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner and that a full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that, if judgment thereof be given, then, under your seal, you do distinctly and openly send the records and process in the suit aforesaid, and all things concerning them and this writ, so that you have the same before the Chief Justice and the associate justices of the Supreme Court of the United States on the first day of the next term of this court, to wit, the second Monday of October next, at Washington, where, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what
48 of *writ* and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the said Supreme Court, this — day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

[Seal of the Circuit Court, Eastern District of Michigan.]

WALTER S. HARSHA,
Clerk of the Circuit Court of the United States
for the Eastern District of Michigan.

Allowed by—
H. B. BROWN.

[Endorsed:] 7531. Supreme Court of the United States. William Aerkfetz, by next friend, pl'ff in error, *vs.* Solon Humphreys & Thomas E. Tutt, receivers, &c., def't- in error. Writ of error. Filed March 11, 1889. Walter S. Harsha, clerk.

49 Supreme Court of the United States.

WILLIAM AERKFETZ, by FREDERICK AERKFETZ, His Next Friend, }
vs.
SOLON HUMPHREYS and THOMAS E. TUTT, Receivers, &c. }

GENTLEMEN: You will please take notice that you are herewith

served with a true copy of a citation heretofore issued in the above-entitled cause.

LEVI T. GRIFFIN &
CARLOS E. WARNER,
Attorneys for Plaintiff.

To Alfred Russell, Esq., attorney for defendant-.
Dated Detroit, March 11th, A. D. 1889.

EASTERN DISTRICT OF MICHIGAN, } *ss:*
County of Wayne, }

Bernard Britt, being duly sworn, deposes and says that on the 11th day of March, A. D. 1889, he served a true copy of the citation annexed hereto, together with a notice of the issuing thereof, a true copy of which said notice is also hereto attached, upon Alfred Russell, Esq., attorney for the defendant- above named, by delivering the same to and leaving them with him, the said Alfred Russell, personally.

BERNARD BRITT.

Subscribed and sworn to before me this 11th day of March, A. D. 1889.

WILLARD E. WARNER,
Notary Public, Wayne Co., Mich.

50 UNITED STATES OF AMERICA, *ss:*

To Solon Humphreys and Thomas E. Tutt, receivers, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the first day of the next term of this court, to be held on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Michigan, wherein William Aerkfetz, by Frederick Aerkfetz, his next friend, is plaintiff in error and you, the said Solon Humphreys and Thomas E. Tutt, receivers, &c., are defendants in error, and show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry B. Brown, judge of the district court and acting judge of the circuit court of the United States for the eastern district of Michigan, this 9th day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

HENRY B. BROWN,
District Judge.

GRIFFIN & WARNER,
Att'ys for Pl'ff.

[Endorsed:] 7531. U. S. circuit court. William Aerkfetz, by next friend, *vs.* Solon Humphreys *et al.* Citation. Filed March 13, 1889. Walter S. Harsha, clerk. Griffin & Warner, att'ys for pl'ff.

51 Know all men by these presents that we, William Aerkfetz, by Frederick Aerkfetz, his next friend, as principal, and Wm. Peters, of Detroit, Michigan, as surety, are held and firmly bound unto Solon Humphreys and Thomas E. Tutt, receivers, &c., in the sum of two hundred and fifty dollars, $250.00, lawful money of the United States of America, to be paid unto the said Solon Humphreys and Thomas E. Tutt or to their certain attorneys, heirs, successors, and assigns; to which payment, well and truly to be paid, we bind ourselves, our heirs, executors, and administrators and each and every of them, firmly by these presents.

Sealed with our seals. Dated this 9th day of March, one thousand eight hundred and eighty-nine.

Whereas lately, at a session of the circuit court of the United States for the eastern district of Michigan, in a suit pending in said court between William Aerkfetz, by Frederick Aerkfetz, his next friend, as plaintiff, and Solon Humpheys and Thomas E. Tutt, as defendants, judgment was rendered against the said plaintiff, and the said plaintiff, William Aerkfetz, by Frederick Aerkfetz, his next friend, conceiving himself aggrieved thereby, has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the eastern district of Michigan:

Now, therefore, the condition of this obligation is such that if the above-named William Aerkfetz, by Frederick Aerkfetz, his next friend, shall prosecute said writ of error to effect and answer
52 all costs if he shall fail to make good his plea, then this obligation to be void, but otherwise to remain in full force and virtue.

WILLIAM AERKFETZ, [L. S.]
his
By FREDERICK x AERKFETZ.
mark.
his
FREDERICK x AERKFETZ. [L. S.]
mark.
WM. PETERS. [L. S.]

Witness-:
C. E. WARNER.
WILLIAM E. WARNER.

Approved.
H. B. BROWN.

UNITED STATES OF AMERICA, } ss:
Eastern District of Michigan, County of Wayne, }

William Peters, being duly sworn, says that he is worth the sum of one thousand dollars, $1,000, over and above all his just debts and liabilities.

WM. PETERS.

Subscribed and sworn to before me this 9th day of March, A. D. 1889.

WILLIAM E. WARNER,
Notary Public, Wayne Co., Michigan.

Endorsed: Bond on writ of error. Filed March 11, 1889. Walter S. Harsha, clerk.

53 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan.

WILLIAM AERKFETZ, by FREDERICK AERKFETZ, His Next Friend,
vs.
SOLON HUMPHREYS & THOMAS E. TUTT, Receivers of the Wabash, St. Louis & Pacific Railway Company.

I, Walter S. Harsha, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify and return to the writ of error issued out by the plaintiff in the above-entitled cause and hereto annexed that the above and foregoing is a true copy of the record and proceedings, bill of exceptions, and bond on appeal as the same appear on file and of record in my office; that I have compared the same with the original, and it is a true and correct transcript therefrom and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this sixteenth day of March, in the year one thousand eight hundred and eighty-nine, and of the Independence of the United States of America the one hundred and thirteenth.

Seal of the Circuit Court, Eastern District of Michigan.

WALTER S. HARSHA, *Clerk.*

Endorsed on cover: Case No. 13,541. E. Michigan C. C. U. S. No. 355. William Aerkfetz, by Frederick Aerkfetz, his next friend, plaintiff in error, *vs.* Solon Humphreys and Thomas E. Tutt, receivers. Filed April 15, 1889.

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Supreme Court of the United States.

October Term, 1891.

TERM NO. 355.

WILLIAM AERKFETZ, by
FREDERICK AERKFETZ,
His next friend,
Plaintiff in Error,
vs.
SOLON HUMPHREYS and
THOMAS E. TUTT, Receivers, &c.,
Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

PLAINTIFF'S BRIEF.

L. T. GRIFFIN,
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Att'ys for Plt'ff.

ALFRED RUSSELL,
Att'y for Def'ts.

Supreme Court of the United States.

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Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This action was brought by plaintiff below against defendants to recover damages for alleged negligence in operating a railroad under their charge as receivers.

The negligence averred is:

1. That defendants did not exercise due and proper precaution towards plaintiff.

2. That defendants did not keep a careful and competent lookout properly stationed on one of their

trains in order to avert danger and apprise plaintiff of any danger to be apprehended.

3. That defendants did not give plaintiff proper signals of warning.

4. That defendants did not exercise proper care and precaution in selecting the track over which they should move and shift their said train or trains.

5. That defendants did not, while plaintiff was upon the track of defendants at Delray, engaged in repairing said track and spiking down one of the rails thereof, apprise plaintiff that they were about to move or shift their train upon said track, and did not stop their train in time to avert danger and accident to plaintiff, when, with reasonable care and precaution, and with the proper lookout, they might have done so.

By reason whereof plaintiff was injured.

The evidence tended to show that plaintiff was injured in August, 1886. He was twenty years old at the time. He was employed as a section man, and worked in the yards of the railroad company at Detroit and Delray. He had worked for the receivers about eighteen months at the time of the accident.

There were quite a number of tracks in the yards, and he was repairing one of them at the time of the injury. He was set to putting on a pair of splices, and after putting them on was told to spike the joint up, and while spiking it, a car struck him and ran over him. There were seven or eight tracks in the yard. There was a main track running through the yard, and a number of tracks running on either side of the main track. He was on the south side of the main track toward the river. Modlin, the foreman of the track repairing, directed him to do the work. He was at work under his general direction. Plaintiff, in

doing the work, was compelled to occupy a somewhat peculiar position. He was required to stand with his legs astraddle of one of the rails. There were notches in the spikes and the spikes were designed to catch the edge of the tie so he had to stand that way in order to drive the spike into the tie in the proper manner.

Plaintiff did not know that any train was coming down the track and his attention was not, in any manner, called to the fact that the train was on the track, or was expected to pass along such track. He saw nothing of the train until it ran over him. A gravel train was going west on the main track at the time he was struck. He heard no noise from the train that struck him. There was no signal of any kind given, nor were there any men stationed on the cars at the time he was run over. The engine was backing and pushing two cars. He was then exercising the usual care which he exercised around the yards. He had no reason to know that any train was coming down the track at the time. His attention was not called to the fact that the train was on the track, or was expected to pass along the track. It had been the custom in the yard to have persons stationed on top of moving trains. There were supposed to be two—one lookout on the front of the train and one at the hind end. Taking a train made up as this train was, he says one man should have been located on the front of the train and one at the back end. A bell was also usually rung as a signal in the yard upon moving trains, and a whistle was sounded. The complement of men usually on moving trains consists of the engineer, fireman and two switchmen. A switchman is usually upon the train besides the engineer. He knew nothing of any train having passed down the bend from the main

track and moving on any track south of the bend; no train had passed up or down there to his knowledge.

Charles K. Modlin, foreman of the track repairing, testified that plaintiff was employed there under his directions. Plaintiff was putting on a pair of splices in the yards. He was spiking down the joints. He says that in order to drive the spike, plaintiff would have to occupy a position according to the way a man strikes. He strikes right-handed, and was striking on the inside of the rail, and necessarily he would have to stand astraddle of the rail to work, with his face to the west.

William Henderson was employed about the yard as yard master, and his special duty was to see that all trains were made up and ready for the road, and to see to the switching of cars and delivering them at proper places. The yard master is supposed to have charge and to give orders that certain cars shall go on certain tracks. *Modlin, by whom plaintiff was employed, had no connection with that department.* He says the cars were being shoved ahead of the engine. Modlin details what he saw of the accident (p. 15.) and says that the ordinary complement of men in charge of switching trains is, the man who has charge of the engine, and a helper, fireman and engineer. He noticed the helper about the train and fireman and engineer. The helper was not on the train. He says further, that by the position of the cars, the engineer's view would be obstructed more than the fireman's, on account of plaintiff standing on the south side of the rail, and the engineer being on the north side. The fireman could possibly see him, he says, before he got too close to him. The first they knew of the accident was when by the gathering they noticed somebody was hurt. He further says that there was no

difficulty about any one seeing any of the workmen engaged on the track unless he was behind the cars. The occupation of the men was open to the observation of the engineer during the afternoon. There was no signal or warning of any kind given by the men on the train to Aerkfetz that he saw. Didn't hear any bell ring or any whistle.

On cross examination, he says that Aerkfetz could not have seen the train in the position he was at that time. *Aerkfetz had always been a very careful and good man.*

Fred. Engfer was also sworn and corroborated plaintiff's statement, that there was no one on the train except the engineer and the fireman. *Nobody was stationed on the train, no signal was given, no bell rung or whistle sounded.*

Some testimony was given on the part of the defendant, which does not change the character of the foregoing testimony.

The case had been once tried, resulting in a verdict for plaintiff, but upon a new trial being granted, the court instructed the jury that the plaintiff had made out no cause of action and their verdict must be for the defendant. A verdict was thereupon rendered accordingly.

The opinion of the learned Circuit and District Judges, upon granting the new trial, will be found upon pages 8 and 10 of the record, and under these opinions three questions present themselves for consideration.

1. Was the defendant guilty of negligence?

2. Was the plaintiff guilty of contributory negligence.

3. Was the plaintiff a fellow-servant of the yard-master, or the train men in the sense that will preclude him from recovery.

I.

The question of negligence upon the part of the defendant, and a want of contributory negligence upon the part of the plaintiff practically involve a discussion on the same state of facts, and we shall, therefore, treat the first and second propositions together.

We submit that there is abundant evidence to warrant the submission of the case to the jury upon either question. It is only in a very clear case that the court will be warranted in withdrawing a question of fact from the jury. The circumstances in this case are peculiar, and it was a matter peculiarly within the province of the jury to determine first, whether or not the defendants were in the exercise of that care, prudence and precaution which they were bound to exercise towards the plaintiff; and secondly, whether or not the plaintiff was in the exercise of reasonable care and precaution upon his part, and it was clearly an usurpation of the functions of the jury in withdrawing those questions from them.

Before entering upon a discussion of the facts, we first cite the court to adjudicated cases upon the question.

QUESTION FOR JURY.

Jones vs. Railroad Company, 128 U. S., 443. In this case the question of negligence upon the part of the defendant and contributory negligence upon the part of the plaintiff were withdrawn from the jury. This court held that it could not agree with the lower

court in holding that there was such a clear case of negligence on the part of the plaintiff as to justify the court in withdrawing the whole subject from the consideration of the jury.

The court say:

"We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as this, as well as others. There is nothing in a case in which it is conceded fully and unreservedly that the defendant company is in fault on account of the manner of running its trains, such as a high rate of speed and other careless matters mentioned by the court in its instructions, which would justify the court in refusing to submit to the jury the question whether the defendant company is relieved from the liability incurred by it by reason of the acts of the plaintiff, showing that in some degree he may not have been as careful as the most cautious and prudent man would have been. *Instead of the course here pursued, a due regard for the respective functions of the court and the jury would seem to demand that these questions should have been submitted to the jury, accompanied by such instructions from the presiding judge as would have secured a sound verdict.*"

Kane vs. Northern Central Railway Co., 128 U. S., 91. In this case the court say:

"It is undoubtedly the law that an employee is guilty of contributory negligence, which will defeat his right to recover for injuries sustained in the course of his employment, where such injuries substantially result from dangers so obvious and threatening that a reasonably prudent man, under similar circumstances,

would have avoided them, if in his power to do so. He will be deemed in such case to have assumed the risks involved in such heedless exposure of himself to danger," (citing cases), "*but in determining whether an employee has recklessly exposed himself to perils or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position;* indeed to all the circumstances of the particular occasion."

In *Washington & Co vs. McDade*, 135 U. S., 554, it is said that as a general rule the question of contributory negligence is one for the jury under proper instructions by the court, especially where the facts are in dispute, and the evidence in relation to them is that from which fair minded men may draw different inferences.

In the latter case the court cites with approval the opinion of the court in *Jones vs. Railroad Co., supra*, and held that under the circumstances of that case it should have been submitted to the jury.

In *Kane vs. N. C. R. R. Co., 128 U. S., 91*, the court recognized the rule that no case should be withdrawn from the jury unless the evidence, *giving the plaintiff the benefit of every inference to be fairly drawn from it*, sustained the view that the court would have been compelled, in the exercise of a sound discretion, to set aside any verdict rendered in his favor.

See, also

Insurance Company vs. Doster, 106 U. S., 30, 32.
Randall vs. Railroad Co., 109 U. S., 478, 482.
Anderson vs. Beal, 113 U. S., 227-241.

If there is any doubt upon the question, either of negligence upon the part of the defendant or contri-

butory negligence upon the part of the plaintiff, it is the duty of the court to give the case to the jury.

Klankowski vs. G. T. R. R. Co., 57 Mich., 525-37.
Teipel vs. Hilsendagen, 44 Mich., 461.
Pierce on Railroads, p. 313, et. seq.

In *Stall vs. Railway Co.*, 57 Mich., 239, it was held that whether a person was culpably negligent must depend on what he was bound to anticipate. The court say: "In the absence of any knowledge of what was passing in his mind, we cannot hold him conclusively at fault unless there is no sensible explanation to the contrary reasonably possible. But he had a right to suppose that defendant would not violate any legal duty, and he could not be bound to suppose it would fail to take reasonable measures to prevent mischief."

In *Teipel vs. Hilsendagen, supra*, the court say:

"If the circumstances are such that reasonable minds might draw different conclusions respecting the plaintiff's fault, he is entitled to go to the jury upon the facts. *The judge takes the case from the jury only when it is susceptible of but one just opinion.*"

Where there is a chance upon the facts shown for ordinary candid and intelligent men to arrive at different conclusions, the question of contributory negligence is to be determined by the jury.

The court cannot usurp the functions of the jury, and the case must be absolutely free from conflict before it can be taken from them.

Marcot vs. Railway Co. 47 Mich., pp. 1-7.
Harris vs. Clinton Tp., 64 Mich., 447, 453.
Adams vs. Iron Cliffs Co., 78 Mich., 271.
Luke vs. Mining Co., 71 Mich., 364.
Dublin W. & W. R'y vs. Slattery, L. R., 3 App. Cas., 1155.
Bridges vs. N. L. R'y Co. L. R. 7, H. of L., 213.

Some of the cases above cited cover contributory negligence upon the part of plaintiff, others negligence upon the part of the defendant, but we apprehend that the same rule applies to either case.

COMPARATIVE NEGLIGENCE.

In *Inland & Seaboard Coasting Co. vs. Tolson*, 139 U. S. 551, it was held that plaintiff's contributory negligence cannot exonerate defendant and bar plaintiff's recovery where defendant might, by the exercise of reasonable care and prudence, have avoided its consequences. Citing

Radley vs. Railway Co. L. R., 1 App. Cas., 754.
Scott vs. Railway Co., 11 Ir. C. L., 377.
Austin vs. Steam-boat Co., 43 N. Y., 75, 82.
Lucas vs. Railroad Co., 6 Gray, 64-72.
Railroad Co. vs. Price, 29 Md., 420.
See also Williamson vs. Barrett, 13 How., 101, 109.

BURDEN OF PROOF.

The burden of proof is on defendant to show that plaintiff was guilty of contributory negligence.

I & S. C. C. vs. Tolson, 139 U. S., 551.
Railroad Co. vs. Gladmon, 15 Wall., 401.
Railroad Co. vs. Horst, 93 U. S., 291.
Hough vs. Railroad Co., 100 U. S., 213.
Railroad Co. vs. Mares, 123 U. S., 710, 720, 721.

Now, we submit that upon the principles established by the above cases that there was abundant evidence to go to the jury upon either of the following grounds :

1. *The failure of the defendant to keep a proper lookout upon the moving train in its then condition and under the then existing circumstances.*

2. *A failure to give plaintiff proper signals of warning by either sounding the whistle, ringing bell, or otherwise warning or apprising him of the danger.*

3. *A failure to use and observe such speed and precautions as would have avoided the danger under the then existing circumstances.*

4. A failure to apprise plaintiff that a train had passed down the lead from the main track and was on the track on which he was working and that danger was to be apprehended therefrom :

First, as to the failure to provide a proper lookout, let us see what the situation was. Plaintiff was engaged in track repairing upon one of the side tracks in defendant's yard south of, and somewhat remote from, the main track. He was engaged in spiking down rails, a duty which not only required close attention, but which required him to occupy a somewhat peculiar position, with his legs astraddle of the rail and his face towards the westward.

Without any knowledge of any train having passed down the lead from the main track and being on any track south of the lead, (pp. 14 15,) a train from the East, consisting of an engine and two cars going towards the West—the cars being shoved ahead of the engine—struck plaintiff and injured him. A construction train, consisting of 30 or 32 flat cars, was *going out* on the main track at the time of the accident. (Modlin, p. 15)

No signal of any kind was given to plaintiff.

Plaintiff says, (page 14,) *that it had been the custom in the yard to have persons stationed on top of moving trains.* There were supposed to be two, one located in the front of the train and one at the hind end. Taking a train made up as this train was made up, one man should have been located on the front of

the train and one at the back end. *A bell is usually rung as a signal in the yards upon moving trains and a whistle is sounded.* The complement of men usually on moving trains consist of engineer, fireman and two switchmen. A switchman is usually upon the train besides the engineer.

Modlin, the track foreman, states that he observed the accident. When we stepped back I saw he was working at his joint, and not noticing the train. He had his back towards the train, so he gave the signal to the engineer or tried to do it, but the engineer was passing with his back towards him and kind of sidewise, in his proper place, and the cars kept moving until they cut off the sight between him and Aerkfetz. * * * The ordinary complement of men in charge of switching trains is the man who has charge of the engine, and a helper, fireman and engineer. The helper was between the main track and this track on the south side of the main track. He was not on the train.

Q. Was he in any position on the train where he could look out and see what was ahead of the train?

A. He was not on the train. The engineer and fireman were in the cab.

He further says, (p. 16) that the engineer and helper were operating there that day, and could see us working as they passed. There was no difficulty about any one seeing any of the workmen engaged on the tracks unless he was behind the cars. The occupation of the men was open to observation of engineer during the afternoon. There was no signal of warning of any kind given by the men on the train to Aerkfetz that he saw.

He further says, (folio 38) that plaintiff could not see the train in the position he was at that time, and

that he had always been a very careful and good man.

Now, it seems to us that common prudence, under these circumstances, would have dictated the placing and keeping of a proper *lookout* on the front of the moving train in order to have avoided an accident of this character. This plaintiff did not even have the warning which the noise and escaping steam from the engine would have given him. These cars were pushed noiselessly and stealthily upon him without warning, and a lifetime of suffering and deprivation was cast upon him from the failure to take this simple and ordinary method of warning him of the apprehended danger.

It certainly cannot be said as *matter of law* that this plaintiff was not in the exercise of ordinary care and prudence upon his part. The very instinct of self preservation would force this prudence upon him. He is shown to be, by defendant's own employees, a *careful and good man*. As is so well said in *Kane vs. Railway Co., supra*, "*regard must always be had to the exigencies of his position.*" What would be negligence under one set of circumstances would not be under another. Everything must depend upon the knowledge of danger to be apprehended, the custom prevailing in regard to avoiding danger, the giving of signals, the maintenance of lookouts, the reliance upon these means of warning, the absorption of the mind in the particular occupation, and a hundred other things which a jury might weigh in reaching a conclusion, but which a court cannot say as matter of law would deny a right or a liability.

In *Kane vs. Railway Co., supra*, plaintiff, a brakeman, had distinct knowledge that a certain step was missing from one of the cars between his foot and

the caboose, yet in a case where he was injured by reason of it, this court held that it might have escaped his attention in the confusion attending the performance of his duty and that it could not be said as matter of law that he was guilty of contributory negligence.

Now in this case the plaintiff had a right to rely upon the usual means which existed for preventing accidents, one of which was the custom of keeping a person stationed on the front of a moving train. This duty was pre eminently owed to plaintiff under the situation and circumstances existing on the day of the accident.

The duty of providing a proper lookout is recognized in many adjudicated cases of similar character.

Marcott vs. M H. & O. R. R. Co., 47 Mich., 1:

In this case failure to keep such a lookout as should have been kept and the existence of special hindrance to a vigilant lookout was charged, among other things, as negligence contributing to an injury whereby a child was killed upon defendant's track.

The court held that the efficiency of a lookout should be such as reasonably required by the circumstances, and that it should be more careful where there is risk of access to the track than where it is less likely.

The court say: "*The necessity of a careful lookout is recognized by the unwritten law of navigation and it is apparent on railroads.*"

Cooper vs. L. S. & M. S R. Co., 66 Mich., 261. Action for negligence. A young girl was killed by being struck by the caboose of a certain train which was backing towards the station at White Pigeon, Michigan. There was no lookout or brakeman on the rear end of the train as it backed towards the station.

The girl had stepped upon the main track, and stood between the rails looking at a receding train when she was struck. Held, that it was gross negligence in defendant to back its train across a thoroughfare like Kalamazoo street, in a village, without a brakeman at the rear end as a lookout and in readiness, in case of danger, to apply the brakes and thus prevent collision or accident.

The court say:

"Can any rational being doubt that, if the brakeman had been upon the rear platform of the caboose, he would have seen the child in time to have stopped the train, propelled simply by its own momentum, at a rate of speed but little faster than a person walks? *A person in that position, without applying the brakes at all, and animated with a desire to save life, could have leaped from, and outstripping the train, rescued the child from danger.*"

Battishill vs. Humphreys, 64 Mich., 514. Action for negligence, resulting in personal injuries to a child. At the time of the injury the child was on the defendant's track going across a culvert towards home. There was a clear view of the track west for two or three miles. The train which did the injury was composed of an engine and tender, and four or five cars.

The engine and tender were running backwards, drawing after them the freight cars.

The court held that it would have been reckless for such train to have been run without any person to look out for accident or danger to individuals upon the track, or upon street crossings, and that it would have been no less reckless for such train to be run while the person charged with the duty of keeping a lookout to avoid danger or accident, neglected such duty.

It was held that defendants were guilty of *reckless* negligence.

We do not contend that the failure to keep a lookout alone would cast a liability upon the defendants. We contend that the defendants were bound to use and exercise *adequate* means and methods, under the then existing circumstances, to have prevented this injury. Possibly other means might have been exercised which would have fulfilled this duty towards the plaintiff, but the care, whatever it was under the circumstances, must have been efficient, and such as reasonably tended to avoid an accident of this character. The defendants' employees knew that the plaintiff was working upon this track and they were bound to exercise reasonable diligence in warning or apprising the plaintiff of the danger to be apprehended. An efficient lookout was one of the usual and ordinary means and would have been unquestionably adequate under the circumstances.

As is said in *Cooper vs. Railway Co., supra*, a person in a position upon the front of this train, without even applying the brakes or signaling the engine, if animated with a desire to save life, could have leaped from, and outstripping the train, rescued this plaintiff from danger. It could likewise have been prevented by calling out to him to beware of the danger, had a lookout been properly stationed.

It was certainly a question for the jury to say whether, under these circumstances, defendants did exercise reasonable care in providing an efficient lookout.

The fact that the plaintiff was on defendants' grounds does not change the character of the obligation. They owed him the distinct duty of care, prudence and precaution, precisely as they owed a trav-

eler upon one of the public streets crossing their thoroughfares; and if the defendants did not exercise the same duty and precaution which they would have been found to have exercised in case of the traveler, then the plaintiff is entitled to recover, and it is for the jury to determine whether this care was so exercised or not.

Second, we contend that a failure to give plaintiff proper signals of warning by either sounding the whistle or ringing the bell, was also negligence which would authorize a recovery upon the part of the plaintiff, and this was purely a question for the jury.

It may be conceded that the duty of blowing the whistle and ringing the bell is largely a statutory duty, applying to street crossings. Nevertheless, the same duty would apply irrespective of the statute. The ringing of a bell and the sounding of a whistle is recognized, not only by statutory provisions, but by the unwritten law, as a proper and useful requirement in order to avoid danger. These are means especially adapted to this end. The effectiveness and propriety of the signals is so generally understood that it is almost universally required by statute in railroad crossings, and is also generally used and applied by railway companies in almost all cases as signals of warning where danger is apprehended.

The necessity and propriety of signals of this character is so apparent that it is almost universally applied upon our public streets in the matter of fire engines, ambulances and other dangerous vehicles upon public thoroughfares. The rapid passing of an ambulance and the vigorous ringing of its bell, while at this point upon our brief, emphasizes the force and effectiveness of a requirement of this character.

The company, *in the absence of statutory provi-*

sion, is required to give such signals of warning as are required in the prudent and skilfull management of its engine and trains to put individuals on their guard.

Pierce on Railroads, 349.
Contintenal Improvement Co. vs. Stead, 95 U. S., 161.
Reeves vs. Railway Co. 30 Pa. St., 454.

It is a question for the jury, under the instructions of the court, what the signal, when not prescribed by statute, should have been.

Pierce on Railroads, 349.
Cadell vs. Railway Co., 64 N. Y., 535.
P. & M. Railway Co., vs. Hoehl, 12 Bush,, 41.
Black vs. Burlington &c. Railway Co., 38 Iowa, 515.
Galena, &c. Railway Co. vs. Dill, 22 Ill., 264-271.
Bauer vs. Railway Co. 69 Mo., 219.
Ellis vs. Railway Co., L. R. 9, C. P., 551.

The evidence tended to show that the plaintiff was engaged at work with his back towards the engine, and without any knowledge of its approach, and yet the engine was allowed to creep upon him without any signals of warning whatever, if the testimony upon the part of the plaintiff be believed, and this while the plaintiff was not only absorbed in the work which he was doing, but also while he was subject to the confusion and natural abstraction caused by an out going train upon another track.

With all deference to the opinion of the learned district judge who tried the case in the court below, and who is now a distinguished member of this court, we submit that his opinion upon this question in his charge to the jury is better than his final opinion when he concurred with the circuit judge in directing a verdict for the defendant.

We take the liberty, as a part of our argument,

of quoting that portion of the charge of the learned judge referring to the ringing of the bell:

"Now, then, it resolves itself into this, whether, in the first place in your opinion, it was necessary for the conduct of this business to ring a bell as the train was moving back and forth through the yard; and in the second place, whether, if you judge that to be necessary—*and I think the necessity of that is a question for the jury in this case*, whether the bell was in fact ringing, and I know of no other negligence with which defendant could be justly chargeable in this case.

"Now, then, in regard to ringing the bell, was it, in your opinion, necessary that a bell should be rung where a train is moving back and forth? Upon that point I shall not attempt to give you any opinion of my own, leaving you to determine that question yourselves, having regard for the number of employees that were in the yard, and to the necessity of these trains going back and forth, because that is almost constant in large yards, whether a bell should be constantly ringing while the train is in motion."

The learned judge did not leave the question of failure to provide a proper look-out to the jury. We submit that such failure was one of the strongest points in plaintiff's case, but in any event that the failure to provide *either* of these useful and efficient methods of averting the danger, were circumstances from which a jury would have been fully warranted in finding the defendants guilty of such negligence as would entitle the plaintiff to recover.

Not only were these methods of providing a look-out and giving the signals required, but other precautions should have been taken. Plaintiff did not know that a train had passed down the lead from the main

track and was on the track on which he was working, or that there was any danger to be apprehended whatever. The testimony establishes the fact that the persons in charge of this train knew that he was working on the track. While the fact alone that the accident occurred would not impose a liability, yet it was preeminently a question for the jury, outside of and beyond the question of keeping a lookout and the giving of the signal, to say whether, in view of all these circumstances, it was not the duty of the defendants to have observed such a rate of speed and taken such other precautions as would absolutely have prevented this accident. The evidence is uncontradicted that the custom prevailed of keeping the lookout and of giving the signals. Plaintiff might have been apprised of the danger then imminent by other means than maintenance of the lookout, and the giving of the signals, but we submit that in any event some efficient means were required to be exercised under the circumstances, and that the failure so to do imposed a liability for which the plaintiff is entitled to recover.

The opinion of the learned Circuit Judge, upon whose opinion a verdict was directed for the defendant, is based entirely on the case of *Goodlet vs. Nashville R. R. Co., 122 U. S., 391.* But we submit, with all deference to the learned judge, that that case has no application to the case at bar.

In that case the evidence showed that plaintiff was a section boss, charged with the duty of keeping its road in repair between certain points, so the trains could pass over it in safety. He ran his handcar into a deep cut, where he was injured, without having sent anyone ahead to watch for and warn the passenger

train, which he knew was approaching or would soon reach that point on the road.

The court held, and it seems to us very properly, that there was not only want of care upon the part of the plaintiff, but utter recklessness.

The case certainly has no analogy to the suit at bar. We think it would be exceedingly difficult for the court to point out, under the circumstances of that case, a violation of any duty whatever which the defendant owed to the plaintiff. In so far as appears from the case, it did not appear that the defendant knew that the plaintiff was upon the track There were no circumstances which would justify or excuse the plaintiff, and the case is certainly no authority for the case at bar.

FELLOW SERVANTS.

This question was not decided by either the circuit or district judge, one of the judges saying that the argument left the matter in such doubt that he was not willing to pass upon that question.

We submit that the plaintiff and the yardmaster, or the employees in charge of the train, were not fellow servants within the meaning of the law. The cases upon this question so holding seem to be multiplying from day to day, and the concensus of opinion by the state and federal judges is unquestionably in the line of holding that plaintiff and the employees in charge of the train are not fellow servants.

Garrahy vs. Kansas City, &c., Railway Co., 25 F. R., 258 ; opinion by Mr. Justice Miller.

Plaintiff was engaged with others under control of a foreman, in taking up and re-laying one of the tracks in defendant's yard. A switch engine, usually

employed in transferring cars from one track to another, with several hands, including fireman and engineer, under the control of another manager or conductor, struck defendant while engaged in the work of re-placing the rails of a track.

Mr. Justice Miller, who delivered the opinion of the court in that case, says:

"The question thus presented is one which has been much considered of late in the courts of last resort in the states, and much discussed at the bar in this and in inferior courts. There is no unanimity in the decisions of the courts, nor in the opinion of the profession. After re-examining the matter, as I have done, in the light of these decisions and of sound principle, to the best of my ability, to understand what that may be in this connection, I remain of the opinion that a common hand engaged in the business distributing iron rails along the side of a track, to be laid in place of other rails removed from that track, and under the control, with six or eight other men, of a boss or foreman, is not in the same employment as a man controlling and managing a switch engine not used in carrying these rails, but in moving and transferring from one place to another, cars not engaged in the business of relaying said track; and this, in my personal judgment as a matter of sound principle, is also the necessary result of the latest decision of the Supreme Court of the United States, on the same subject in the case of *Chicago, &c., Railway Co., vs. Ross, 112 U. S., 377.* The length of time that case was held under consideration by the court, and the ultimate dissent of several of its members, show the serious attention it received and by it I am governed."

In *Chicago, &c., Co vs. Ross*, above cited, it was held that a conductor of a railroad train, who has the

right to command the movements of the train and to control persons employed upon it, represents the company while performing those duties and does not bear the relation of fellow servant to the engineer and other employees of the corporation on the train.

It will be unnecessary to further cite the opinion of the court in that case. The opinion of the court is sustained by an elaborate citation of authorities, the reasoning of which applies with full force to the case at bar. It is grounded upon considerations of public policy, and the rule is recognized that to bring the case within the exemption, there must be this most material qualification, that the two servants must be men in the same common employment and engaged in the same common work, under that common employment.

See also *Railroad Co vs. Herbert*, 116 U. S., 648, where it was held that a brakeman and the officers or agents of the company charged with keeping the car in repair were not fellow servants within the common law rule.

In *Shannon vs. Androscoggin Mill Co.*, 66 Maine, 420, it was held that a person whose duty it was to keep machinery in order was not a fellow servant of the plaintiff, whose duty it was to clean such machinery. The court say:

"They are not employed in the same common business, tending to the same common results. Two persons may indeed work under the same master and receive their pay from the same source, but this is not sufficient. They must be at the same time engaged in a common purpose, or employed in the same general business."

In *Howard vs. Canal Co.*, 40 F. R., 195, it was held that trackmen, when engaged in their own de-

partment of the general service, are not fellow servants with trainmen, engaged in their department, in such sense as to exempt the master from liability to the former for injury sustained by reason of the negligence of the latter.

To the same effect is the decision in *Railroad Company vs. O'Brien*, 21 Pacific Rep., 32.

In *Pike vs. Chicago &c Railroad Co*, 46 F. R., 95, it was held that a bridge watchman on a railroad and the engineer and conductor of a train on the road, being engaged in different departments of the company's service, and working under the immediate direction of different foremen, are not fellow servants so as to exempt the company from liability to the former for the trainmen's negligence.

In *Sullivan vs. Railway Co.*, 97 Mo., 114, it was held that the engineer in charge of a train and a section boss, did not occupy the relation of fellow servants.

In *Railroad Company vs. Moranda*, 93 Ill., 303, it was held that persons employed in different departments of the same general service and under the immediate supervision of different officers or foremen, and who do not co-operate together in such manner as to bring them together so they can exercise a cautionary influence over each other, are not fellow servants.

It was consequently held that a foreman of a party of track repairers was not the fellow servant of a fireman of a passing train.

In *Sadowski vs. Car Co.*, 84 Mich., 106, the supreme court of Michigan held that a common laborer employed in a lumber yard was not a fellow servant with the yard foreman and his men who, by the direction of the superintendent, dug a ditch in which to

lay a water pipe, left it uncovered, whereby the laborer was injured.

The court held that the doctrine of fellow servant never applies unless the one injured and the one at fault were engaged in the same general employment. Whatever conflict has arisen in cases has been as to what should be considered the same general employment.

The court cites with approval *Railroad Co. vs. Herbert, supra.*

See also,

Atchinson &c. Co. vs. Moore, 31 Kas., 197.
Hannibal &c. Co. vs. Fox, 31 Kas., 586.

In *Hullehan vs. Green Bay Co.*, 68 Wis. 520, it was held that a section boss who failed to keep the track clear and unobstructed was not a fellow servant with a brakeman.

In *North Chicago Rolling Mill Co. vs. Johnson*, 114 Ill., 57, it was held that the plaintiff, who was at work unloading a freight car standing on a spur of a side track, was not a fellow servant with the train men.

The court, in referring to earlier decisions of the Illinois courts with reference to the exemption from liability on account of the negligence of a fellow servant, held that in order to exempt the master from liability the co-employees shall be directly co-operating with each other in a particular business, *i. e.* the same line of employment, or that their mutual duties shall bring them into habitual association so that they may exercise a mutual influence upon each other promotive of proper caution. The idea is that the relation between the servant must be such that each, as to the other, by the exercise of ordinary caution, can either prevent or remedy the negligent acts of the other, or protect himself against its consequences;

and, of course, where there is no right or no opportunity of supervision, or where there is no independent will, and no right or opportunity to take measures to avoid the negligent acts of another without disobedience to the orders of his immediate superiors, the doctrine can have no application.

In *Chicago, &c., Railway Co. vs. Bingamheimer*, 116 Ill., 226. Held that a servant whose duty it was to clean out the cars was not a fellow servant of the engineer.

In *Chicago, &c., Railroad Co. vs Hoyt*, 122 Ill., 369, held that a car inspector was not a fellow servant with the engineer.

This decision was put upon the ground that inspecting cars had no relation to, or connection with, the running of trains. It is not the same service. The car inspector is no more a fellow servant with an engine driver than any workman in the shops.

In *McCune vs. Railroad Co.*, 66 Cal., 302; it was held that plaintiff, who was one of a gang of laborers under a foreman, and who was injured by collision, after dark, with a special train consisting of a locomotive and flat car, was not a fellow servant with the train dispatcher.

See also,

Beeson vs. Green Mountain Co., 57 Cal., 20.

In *Moon vs. Railroad Co., 78 Va., 746*, it was held that Moon, who had been employed by the conductor of a train, and was one of the rear brakemen, was not a fellow servant with a section foreman who was at work upon a curve in the road, in repairing the track.

See,

Connelly vs. Davidson, 15 Minn., 51.

The reason of the applicability of the rule is, as said in repeated cases, that each servant engaged in the same department of business, for the safety of all shall be interested in securing a faithful and prudent discharge of duty by his fellow servants and reporting to the master any delinquencies of those engaged with them in the performance of duty.

Ryan vs. Railroad Co., 60 Ill., 171.
Moon vs. Railroad Co., 78 Va., 746.
Chicago &c. Railroad Co. vs. O'Keefe, 47 Ill., 110.
Lalor vs. Railroad Co., 52 Ill., 401.

In *Zeigler vs. Railroad Co.*, 52 Conn., 543, it was held that plaintiff, who was a brakeman, and was injured by a collision caused by the negligence of the conductor, was not a fellow servant with the conductor. The court say:

"The defense of common employment has little of reason or principle to support it, and the tendency in nearly all jurisdictions is to limit, rather than to enlarge its range. It must be conceded that it cannot rest on reasons drawn from considerations of justice or of public policy. So far as the rule is to be retained it must have its foundation in the contract theory. A writer in the American Law Register for July, 1885, after a review of the law, and noticing the drift of modern decisions, says: "If the law is to remain unchanged will it be upon the ground that the servant assumes the risks incident to his employment, a conclusion which, though it may sometimes bear hard, is reasonable enough. Never was it more important than it is now when the tendency in every department of thought is to pass authority by and search into the causes of things that the law should commend itself to the plain sense of men in its reasonings as well as its rules."

train. Their duties were not "common." They were distinct, separate and independent, one not in any manner depending upon the other.

The rule has nothing in it in reason to apply to the present case. We think no considerations of public policy can apply which would require this plaintiff to assume and take the risk of negligence by the operatives of this train when he had no control over them in any respect.

It has been doubted by able judges whether the reason which brought the rule into being requires that it should still be maintained.

The plaintiff has received a severe injury by the negligence of the defendants' employees in another department of duty, and we submit that the plaintiff, upon the whole case, is entitled to recover.

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